

December 19, 2014

Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554

Re: GN Docket No. 14-28, Protecting and Promoting the Open Internet; GN Docket No. 10-127, Framework for Broadband Internet Service

Dear Ms. Dortch:

Public Knowledge takes this opportunity to augment the already overflowing record in support of strong Open Internet rules grounded in clear Title II authority. The Commission must take the opportunity created by the D.C. Circuit Court to craft unified bright line Open Internet rules for all broadband Internet access telecommunications services, regardless of the technology used to transmit data. In the wake of President Obama's full-throated endorsement of robust Open Internet rules based in Title II authority, Public Knowledge hopes the Commission is moving quickly to protect the future of the Open Internet. It is well past time for durable rules that prevent ISPs from undermining the network compact or interrupting the virtuous cycle. In an effort to assist the Commission's efforts, Public Knowledge offers additional information about how the Commission can treat the broadband component of Internet access service. Public Knowledge also clarifies that wireless Internet customers must receive the same protection as wired Internet customers, something that is possible because wireless Internet access is a CMRS or CMRS-equivalent service. Additionally, Public Knowledge reminds the Commission that it has the flexibility to defer final decisions about the forbearance of some sections if such a final determination would benefit from additional information. Finally, Public Knowledge suggests a rules framework designed to prevent ISPs from unfairly exploiting a specialized services exemption.

I. The D.C. Circuit's Opinion in *Verizon v. FCC* Found that Broadband is a Unified Service.

Since the *Cable Modem Order*,¹ the Commission has held that the "offer" of broadband service is an offer of an information service, not an offer of a telecommunications service. PK has previously explained to the Commission how, while the reasoning in the *Cable Modem*

¹ Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Internet Over*

Order is consistent with the controlling precedent, the Commission erred by finding DNS lookup services to be an information service—thus undermining the basis for finding broadband access itself to be a telecommunications service.² (Email, webhosting, and other information services may be sold by a broadband provider as part of the same bundle as a telecommunications service, but they are not "functionally integrated" and are thus not part of the same "offer.") This still holds. PK does not believe the FCC is required to overturn the basic *reasoning* of its classification decisions (though it has the ability to do so), but applying the FCC's basic framework to an evolved broadband market and clearer understanding of the facts would lead to a different outcome.³

A. The D.C. Circuit Opinion in Verizon v. FCC Makes the "Functional Integration" Rationale Untenable.

However, in light of the D.C. Circuit's decision in *Verizon v. FCC*,⁴ there is an additional basis for the Commission to apply precedent and conclude that broadband is a telecommunications service. By focusing on the function that carriers perform when returning traffic from an "edge provider" to a subscriber, the D.C. Circuit identified a telecommunications function that cannot be functionally integrated into the "offer" of information services to the end user.

The D.C. Circuit firmly held that broadband providers are "carriers with respect to edge providers." Edge providers are "currently able to 'hire' [the] service [of broadband providers] for free," but are nonetheless customers of broadband providers. But the service broadband providers offer to edge providers is not distinct from the service that broadband providers offer to end users. In the language of the Supreme Court's *Brand X* decision, since these services are "functionally integrated (like the components of a car)," not "functionally separate (like pets and

² Comments of Public Knowledge in Framework for Broadband Internet Service, GN Docket No. 10-127 at 9-25 (July 15, 2010).

³ First, the Commission should find that an ISP's DNS is not "functionally integrated" with broadband access since an end user can obtain DNS service from third-party providers, such as OpenDNS. Alternatively, the Commission could find that DNS itself is a telecommunications service, because the definition of information service "does not include ... any ... capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24). This is what DNS does. Thus, DNS is a telecommunications service, at least when "functionally integrated" with transmission, as ISPs argue it is.

⁴ Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

⁵ *Id.* at 653.

⁶ *Id.* at 654.

leashes),"⁷ they constitute a unified whole. One cannot be used—or even exist—without the other.

However, as the D.C. Circuit found, one service element of the bundle offered to the end user subscriber *cannot* be functionally integrated into the bundle—the return path from the edge provider back to the user. The basis for finding that the end user service is an information service has been the integration of information services with transmission elements. But applying the D.C. Circuit's findings to the *Brand X* test for functional integration, one component inherent in the two-way service—the ability of any "edge provider" to reach the end user subscriber—cannot be functionally integrated with this end user service. It must always stand apart as a separate, non-integrated component because it is not directly "provided to the end user." And since the Commission has consistently emphasized that the definition of broadband requires two-way service, the inability as a matter of law to regard the return path capability as "functionally integrated" with the general offer to the subscriber undermines the Commission's previous conclusion.

B. The Non-Integrated Return Path is "Telecommunications," Therefore Providing this Capability as Part of the Bundle to the End User Subscriber is a Telecommunications Service.

None of the information services the FCC has identified in the past—whether DNS or otherwise—are part of the "functionally integrated," two-way service. The two-way communications service an ISP provides to edge providers and end users is pure telecommunications, "uncontaminated" by any information service components. It is the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," with no admixture of any service that offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." This two-way service is therefore governed by Title II of the Communications Act, and the FCC should recognize it as such.

⁷ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 991 (2005) ("Brand X").

⁸ See Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, 22 FCC Rcd 5901, 5909-11 (2007) ("Wireless Declaratory Ruling").

⁹ Brand X, 545 U.S. at 988 (quoting Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798, 4823 ¶ 39 (2002)).

¹⁰ Id. at 5909 n.55 (distinguishing wireless broadband from one way services like mobile paging).

¹¹ 47 U.S.C. § 153(50).

¹² 47 U.S.C. § 153(24).

Such a finding is consistent with the Commission's previous determinations that the basic transmission component constitutes "telecommunications." The Commission's conclusion that "an end user . . . expects to receive (and pay for) a finished, functionally integrated service," however, remains untenable in light of the fact that the return path (part of the expected bundle) cannot be functionally integrated. Again consistent with the Commission's previous reasoning, because the broadband provider must "offer the transmission component of wireless broadband Internet access as a telecommunications service, the regulatory regime appropriate to the nature of the telecommunications service will apply."

C. The Verizon Decision Should Not Be Interpreted as Finding a New, Distinct Service Offering to Edge Providers.

It would be wrong to read the *Verizon* decision as creating a separate service offering, complete with its own, distinct classification and rules. As an initial matter, such a literal reading would make no sense. The entire relationship exists solely as a function of the two-way service provided to (and paid for) by the end user subscriber. Any similar two-way service, including the paradigmatic Title II offering of "plain old telephone service" (POTS), could be broken down into separate components and parsed as separate services. No one, however, has ever suggested that POTS consists of two distinct offers, including an offer to any "edge provider" to "terminate calls made to a subscriber." Conversely, adopting a literal reading of the D.C. Circuit's decision would allow even traditional voice providers to evade their common carrier obligations by characterizing the ability of subscribers to receive incoming calls as a separate service offered on a non-common carrier basis.

Additionally, it is important to note that the D.C. Circuit speaks in terms of "functions" and "obligations," not in terms of a separate and distinct service offering. ¹⁶ If the D.C. Circuit had intended to overrule the Commission on its understanding as to how the Internet actually works, a technical matter where deference owed to the agency is greatest, it would surely have been much more explicit. Certainly it would never have created an entirely new service out of whole cloth, on pure speculation, in the absence of any evidentiary record, and in light of the broad consequences to the entire Communications Act of effectively transforming every single unitary two-way service offering into multiple offerings. The far more logical reading, therefore,

¹⁵ *Id.* ¶ 33. *See also* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, 14909-10 (2005).

¹³ Wireless Declaratory Ruling 22 FCC Rcd at 5912-13.

¹⁴ *Id*. ¶ 31.

¹⁶ See, e.g., Verizon, 740 F.3d at 653 ("201(a) describes a 'duty' of a common carrier, not a pre-requisite for qualifying as a common carrier in the first place.").

is to read the *Verizon* decision as describing a single, non-integrated telecommunications *component* of the offering to the end user in the form of an ability to receive communications as well as transmit them.¹⁷

At most, the D.C. Circuit's opinion requires the conclusion that it identified a distinct customer *class*, but not a distinct *service* (or service offer). The D.C. Circuit found that the FCC violated the "common carrier prohibition" *with respect to edge providers* because it had classified broadband service as a whole as an information service. Even though the Commission's precedent until now has focused entirely on the end user customer relationship, the D.C. Circuit found that the Commission has issued a "still-binding decision to classify broadband providers not as providers of 'telecommunications services' but instead as providers of 'information services," which action "classified [broadband providers] as statutorily exempt from common carrier treatment." Because of this, the Court concluded that "[i]n requiring broadband providers to serve all edge providers without 'unreasonable discrimination," "the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers], *pro tanto*, to common carrier status."

By finding that the FCC has already affirmatively classified the edge provider service as an information service, the D.C. Circuit has assumed, consistent with the *Brand X* test, that a two-way communications service, though it may have customers at both ends, is a unitary service, and that the regulatory classification of the service is the same in both directions. Under the D.C. Circuit's reasoning, if the end user service is an information service, then the edge provider service (which is the same service) is necessarily also an information service (which is the same service) is necessarily also a telecommunications service.

¹⁷ It is also worth noting that the D.C. Circuit acted without the benefit of the FCC's expert opinion on the specific question of whether the return path to subscribers constituted an entirely separate and independent service offering, and if so what implications this would have for the Communications Act and common carriage generally. *See Brand X*, 545 U.S. at 981-86.

¹⁸ *Verizon*, 740 F.3d at 650.

¹⁹ *Id.* at 654.

²⁰ *Id.* at 655-56.

²¹ Id. at 655 (citing FCC v. Midwest Video Corp., 440 US 689, 700-701 (1979)).



II. Wireless Internet Customers Must Receive the Same Open Internet Protections as Wired Internet Customers.

A. There is One Internet, and Strong Open Internet Rules Must Not Apply to Some Connection Technologies and Not Others.

While the Internet can be reached by a variety of technologies, strong rules must protect all access to the Internet irrespective of how consumers get to it. The Communications Act defines a telecommunications service as "the offering of telecommunications for a fee directly to the public, *regardless of the facilities used*." The plain language of the statute makes it clear that in determining the regulatory status of an offering, the Commission should not look to the technology underlying that offering.

Despite the Commission's acknowledgement in its 2010 order that "the benefits of ensuring Internet openness outweigh the costs" on both wireline and wireless, it cautiously elected to apply weaker standards to wireless for blocking and exempted it from the unreasonable discrimination prohibition entirely. At the same time, it wisely tempered this with a commitment to evaluate the rapidly evolving wireless marketplace to determine whether it would later make sense apply additional Open Internet rules to mobile as well. It is long past time for the Commission to do so. The wireless marketplace is now sufficiently established and robust to support strong protections on par with those provided to wireline subscribers. In fact, as Public Knowledge has previously illustrated in great detail, the realities of today's marketplace underscore the need to provide the same protections for users of wireless Internet as those provided to wireline users.

Furthermore, in many communities wireless remains the sole option for Internet access. Allowing wireless ISPs to block or discriminate would create a second class Internet and widen the digital divide. It would ensure by default the creation of a two-tiered Internet system—a result the majority of stakeholders and even the President agree must be avoided. ²⁶ Presumably,

²² 47 U.S.C. § 153(46).

²³ Preserving the Open Internet, *Report & Order*, 25 FCC Rcd. 17,905, \P 8 (2010) ("*Open Internet Order*").

²⁴ *Id*.

²⁵ Initial Comments of Public Knowledge in Framework for Broadband Internet Service, GN Docket No. 14-28, at 24-26 (July 15, 2014) ("*Initial Comments of Public Knowledge in GN Docket 14-28*").

²⁶ See Statement of President Barack Obama, "Net Neutrality: President Obama's Plan for a Free and Open Internet," November 10, 2014; see also, e.g., Comments of Consumers Union, GN Docket No. 14-28 (filed July 15, 2014); Comments of Free Press, GN Docket No. 14-28 (filed July 17, 2014) ("Comments of Free Press"); Comments of Internet Freedom Supporters, GN Docket No. 14-28 (filed July 18, 2014); Comments of the Open Technology Institute at the New America Foundation and Benton Foundation, GN Docket No. 14-28 (filed July 17, 2014); Comments of Access, GN Docket

the Commission deems any rules it adopts necessary to protect consumers on the Internet. Without regulatory parity on between wireless and wireline, consumers engaging in identical behaviors and at identical risk for ISP abuses might nonetheless be unprotected based solely on the means of access they use. The result is "unneutral" Open Internet rules that protect only a portion of all Internet users—those fortunate enough to be using wireline—while the remainder are left to languish in a degraded "second-class" wireless world.²⁷

This is particularly harmful for the many traditionally disadvantaged communities that rely on wireless as their only Internet connection. The detrimental impact of creating a "second class" Internet is compounded by the fact that wireless is disproportionately the only access option for many populations that already are underrepresented in the mainstream media. Although not a sufficient substitute to wireline, wireless provides the only on-ramp to the Internet for many rural, low-income, and traditionally marginalized communities.²⁸

Exempting wireless service from Open Internet rules would therefore undermine what has been one of the most important effects of the Internet: providing an alternative means of representation to underrepresented demographics. Rural, low-income, and minority communities have generally had less access and disproportionately low representation in all forms of media. ²⁹ The advent of Internet-delivered media on a neutral basis created an opportunity to change that for everyone, but it was particularly instrumental for underrepresented populations. As such, weak protections for wireless pose the greatest threat to many populations to whom the Internet has arguably been of the most benefit. ³⁰

All of this is not to say that strong Open Internet rules should be blind to relevant distinctions between access technologies. Public Knowledge has long recognized that many technical factors—ranging from atmospheric condition to interference from other sources, to differences in the propagation and penetration characteristics of frequencies—can impact the ability to network operators to deliver consistent and reliable service over mobile Internet

No.14-28 (filed July 18, 2014); Comments of Open MIC, GN Docket No. 14-28 (filed July 14, 2014); Comments of the Future of Music Coalition, GN Docket No. 14-28 (filed July 15, 2014).

²⁷ The Commission itself has noted that because the two largest wireless providers also offer wireline or fixed service, this could dampen their incentives to compete aggressively with wireline (or fixed) services, making it especially critical that mobile-only users receive the same protections as their wireline access counterparts. See *Open Internet Order* at ¶ 33.

²⁸ See Initial Comments of Public Knowledge in GN Docket 14-28 at 27-28.

²⁹ See id.; see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 11-121, Eighth Broadband Access Report, FCC 12-90 (Aug. 21, 2012); see also Steven J. Blumberg & Julian V. Luke, Wireless Substitution: Early Release of Estimates From the National health Interviews Survey, July-December 2013, National Health Interview Survey (July 2014).

³⁰ See Initial Comments of Public Knowledge in GN Docket 14-28 at 27-28.

access.³¹ Fortunately, to the extent a technical difference between wireless and wireline exists, reasonable network management policies can accommodate it.³² Reasonable network management gives broadband Internet access service providers the ability to deal with technical constraints within their networks—though this is not an excuse for non-technical distinctions.³³ To the extent this occurs due to technical limitations in network architecture, reasonable network management should allow carriers to alleviate congestion *in a neutral manner*.³⁴

B. Mobile Broadband Internet Access Should Be Reclassified as CMRS.

In 2007, the FCC issued a declaratory ruling finding that (a) mobile broadband was not an information service, and (b) it was not a CMRS service.³⁵ The *Wireless Declaratory Order* did not address the question of functional equivalence. The time is now ripe for the Commission to reconsider its determination that wireless broadband is not "interconnected" with the public-switched network ("PSN") because it requires an application to reach the PSN.³⁶

The distinction the Commission relied on in the 2007 *Wireless Declaratory Ruling*, that because customers relied on a distinct separate downloaded application to reach the PSN, is meaningless.³⁷ Overall, the technical distinctions between access technologies that led the Commission to its determination in 2007 have increasingly diminished and will continue to do so.³⁸

As discussed below, the Commission should reverse its previous definition of mobile broadband as PMRS for two reasons. First, the distinction the Commission drew with regard to what constitutes the "capability" to reach the PSN—the network using NANP numbers—is no

³¹ This is why Public Knowledge has so often urged the Commission to make more low-band spectrum available to competitors through spectrum caps, better roaming rules, and greater access to shared low-band spectrum such as the TV white spaces. It is also why wireless broadband is a complement, rather than a substitute, for wireline.

³² See Initial Comments of Public Knowledge in GN Docket 14-28 at 26-28; Letter from Gene Kimmelman, President, Public Knowledge, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3 (Nov. 7, 2014).

 $^{^{33}}$ *Id*.

³⁴ See Initial Comments of Public Knowledge on GN Docket 14-28 at 28.

³⁵ Wireless Declaratory Ruling.

³⁶ See Appropriate Regulatory Treatment for Broadband Access To The Internet Over Wireless Networks, 22 FCC Rcd 5201, 5915 (2007) ("Wireless Framework Order").

³⁷ See Letter from Michael Calabrese et al. to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 4-6 (Dec. 11, 2014).

³⁸ *Id.* at 3-6.

longer valid. Second, the limitation of the definition of "interconnected" in Section 20.3 to NANP numbers no longer makes sense in the context of today's networks.

As the *Wireless Declaratory Order* noted, a service is considered "interconnected" under the existing definition where the service "gives subscribers the *capability* to communicate to or receive communication from all other users on the public switched network." In determining broadband service did not provide this capability, the Commission relied on two factors. The Commission distinguished the capability provided by mobile broadband from the capability provided by CMRS handsets because broadband users "need to rely on another service or application, such as voice over Internet Protocol (VOIP), that rely in part on the underlying Internet access service" to reach NANP number users. ⁴⁰ Additionally, the Commission noted the clear, strict separation between the physical public switched network and the mobile broadband network. ⁴¹

As discussed below, while this distinction was understandable in 2007, it makes no sense in today's network and in light of today's user expectation.

1. Changes in the Marketplace Since 2007.

In its Wireless Declaratory Order, the Commission justified its finding in large part based on its observation that

Mobile wireless broadband Internet access service in and of itself does not provide this capability to communicate with all users of the public switched network. . . . Instead, users of a mobile wireless broadband Internet access service need to rely on another service or application, such as certain voice over Internet Protocol (VoIP) services that rely in part on the underlying Internet access service, to make calls to, and receive calls from, 'all other users on the public switched network.'

As today's mobile broadband users move from the flip phones that were common in 2007 to smart phones and other devices, the distinction made by the Commission in the *Wireless Declaratory Order* between calls made with native dialing capacity and calls made via VoIP applications is increasingly inapt. Today's mobile broadband user can choose between both applications integrated with the native operating system of the phone (e.g., FaceTime on the iPhone or iPad) or independent downloaded applications (e.g., Skype) to make voice (and often video) calls using the NANP to any other user of the PSN, even if the user is not connected to the Internet. Users "rely" on these ubiquitous and typically free applications no more so than a

³⁹ *Wireless Declaratory Ruling* ¶ 43 (emphasis added).

⁴⁰ Id.

⁴¹ *Id.* n.118.

⁴² *Id.* ¶ 45.



telephone subscriber relies on customer premises equipment ("CPE") and software to mediate a call over the ISP's telephone line. In a world where the Title II CMRS "key pad" and an interconnected voice application such as FaceTime are both applications using the same touchscreen, it is difficult to see how the user "reliance" on the FaceTime application provides a different capability than reliance on the keypad that connects to the Title II CMRS service. ⁴³

In 2007, carriers did not generally permit consumers to download competing VoIP applications. ⁴⁴ Carriers routinely dictated to handset manufacturers what features they would and would not permit, making it difficult or impossible for consumers to easily access the PSN using their data plans. ⁴⁵ To the extent consumers accessed mobile broadband, they did so through "flip phones" with the limited applications made available by the carrier. As the Commission noted in the *Wireless Declaratory Ruling*, mobile broadband available with a standard mobile phone of the time "enable[d] users to access a limited selection of websites" and primarily offered extremely limited functionality such as email. ⁴⁶ Independent "app stores" that allow for seamless downloading and integration of standalone applications into the customer's handset did not exist. Only one carrier, AT&T, offered anything resembling a modern smart phone.

By contrast, VoIP applications now come bundled with the primary operating systems available in every smartphone. ⁴⁷ As the Commission repeatedly stressed in the *Wireless Declaratory Order*, service classification "appropriately focuses on the end user's experience."

⁴³ Again, it is important to stress, as discussed in greater detail below, that these similarities do not resolve whether the services are the *same* and should be governed by the same regulatory regime, or whether they are economic substitutes for each other. For example, Public Coast Stations, Cellular Radio Telephone Service, Air-Ground Radio Service, and Personal Communications Service are all common carrier CMRS services, *See* 47 C.F.R. § 20.9, because they all share the same capability of allowing a subscriber to reach any other PSN user. This does not stop the Commission from regulating these services in entirely different ways appropriate to the specifics of the service. Nor does it mean that these services are economic substitutes for one another.

⁴⁴ See, e.g., Skype Communications S.A.R. L., Petition to Confirm A Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (Feb. 20, 2007).

⁴⁵ See Tim Wu, Wireless Carterfone. International Journal of Communication, Vol. 1, p. 389, Columbia Public Law Research Paper No. 07-154 (2007), http://ssrn.com/abstract=962027.

 $^{^{46}}$ Wireless Declaratory Ruling, 22 FCC Rcd at 5906 \P 11 & n.43.

⁴⁷ Both Apple's FaceTime (bundled with iOS) and Google Chat (bundled with Android) are capable of providing interconnected VoIP service. It is important to stress that the question is not whether these VoIP services are themselves Title II services, or whether they constitute economic substitutes for existing Title II services. Rather, the question is whether consumers understand that a subscription to the carrier's mobile broadband service will give the subscriber the *capability* to reach NANP number users in the same way that subscription to the carrier's mobile voice network does. This is a far more limited question than the ultimate question of whether VoIP services meet all the elements of the definition of a telecommunications service.

⁴⁸ Wireless Declaratory Ruling, 22 FCC Rcd at 5909 ¶ 21.

Again focusing on the consumer perspective, the distinction that the Commission found determinative in 2007 between native capability and use of a standalone application is nonexistent—even nonsensical—in 2014. For the consumer, a "separate application" to use VoIP and reach NANP number users is indistinguishable from the rest of the CPE used to access the mobile carrier's Title II CMRS service.

Nor should it matter that a consumer obtains the actual phone number to reach other NANP number users from another provider. Thanks to mandated number portability, the connection between phone numbers and service providers is now broken. Similarly, consumers now fully expect to take their smartphones and any other CPE from one provider to another. Today, a consumer can bring not merely her own CPE, but her own phone number, to a carrier and receive Title II CMRS service. Under the distinction made by the Commission in the *Wireless Declaratory Order*, however, the fact that a customer now can use independently purchased CPE and a NANP number obtained from another source would mean that even traditional CMRS service no longer provides the "capability" to interconnect with the PSN and therefore PCS is no longer a CMRS service.

In short, the evolution of the marketplace has eroded the distinction between a VoIP application and native dialing capability using traditional CPE.⁵⁰ The Commission should recognize this change and reclassify mobile broadband as a Title II telecommunications service.

2. The Mobile Broadband Network and the Physical PSN Have Become Increasingly Interconnected and Merged.

The mobile network described by the Commission in 2007 was undeveloped and clearly distinct from the existing (and dominant) circuit switched network. The 2007 Order does not even contemplate LTE, which now interconnects directly with NANP users through VoLTE. Calls made via VoLTE will operate in the same manner as calls using GSM or CDMA today, interconnecting with the PSN and providing reliable voice service, but do so over the same network as other LTE data. Mobile providers are now directly interconnecting with the PSN using VoLTE on a carrier-to-carrier basis. Carriers are also using unlicensed LTE voice over

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⁴⁹ See Mobile Phone and Unlocking Guide, FCC http://www.fcc.gov/device-unlocking-faq; Statement of Chairman Thomas E. Wheeler on the Industry Agreement on Device Unlocking (Dec. 12, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-324664A2.pdf.

⁵⁰ In this regard, it is worth noting that a recent television commercial by Apple highlights the capability of the iPhone 6 using a standard Title II CMRS contract to place a phone call to an iPad user with a data contract (while pretending to be a fancy French restaurant maître de).

⁵¹ Wireless Declaratory Ruling 22 FCC Rcd at 5906-08 ¶¶12-15.

⁵² See, e.g., Verizon and AT&T Move toward Voice Over LTE Interoperability, Verizon (Nov. 3, 2014), http://www.verizonwireless.com/news/article/2014/11/verizon-and-att-move-toward-voice-over-lte-volte-interoperability.html.

WiFi capability, further blurring the formerly strict physical lines between the mobile data network and the PSN.⁵³ The Commission's recent actions on wireless infrastructure⁵⁴ and the broader technology transitions of the network⁵⁵ emphasize the extent to which the physical networks that comprise mobile networks, traditional PSN services, and broadband services, continue to blend and merge into one another.

To the extent that the Commission's determination in 2007 rested on a clear physical distinction between the traditional circuit switched network and the nascent mobile broadband network, such a distinction no longer exists. The Commission should recognize this reality by reversing its 2007 ruling and finding that mobile broadband has the "capability to communicate or receive communication from all other users on the public switched network" and is therefore an interconnected service.

3. Other Policy Reasons Favor Reversing the Wireless Declaratory Ruling.

Several other policy reasons cited in the *Wireless Declaratory Ruling* now favor classification of mobile broadband as Title II. As an initial matter, the Commission found that classification of mobile broadband as a Title I service would serve the purposes of Section 706 by encouraging infrastructure investment and facilitating competitive entry. ⁵⁶ As is well documented in the comments in this proceeding, these predictions have turned out to be wrong. To the contrary, without reclassification of mobile broadband as a Title II service, the Commission cannot protect the "virtuous cycle" that both stimulates demand and stimulates investment throughout the broadband infrastructure. ⁵⁷

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⁵³ See, e.g., Monica Alleven, Confirmed: T-Mobile to Launch Unlicensed LTE at 5 GHz, Probably Next Year, Fierce WirelessTech (Dec. 17, 2014) http://www.fiercewireless.com/tech/story/confirmed-t-mobile-launch-unlicensed-lte-5-ghz-possibly-next-year/2014-12-17?utm_medium=rss&utm_source=rss&utm_campaign=rss.

⁵⁴ See Acceleration of Wireless Deployment by Improving Wireless Facilities Sitings, Report and Order, WT Docket No. 13-238 et al. (rel. Oct. 21, 2014).

⁵⁵ See Ensuring Customer Premises Equipment Backup Power for Continuity of Communications, PS Docket No. 14-174, Technology Transitions, GN Docket No. 13-5, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, RM-11358, Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Notice of Proposed Rulemaking and Declaratory Ruling (rel. Nov. 25, 2014) ("Tech Transitions NPRM").

⁵⁶ Wireless Declaratory Ruling, 22 FCC Rcd at 5911.

⁵⁷ The *Wireless Declaratory Ruling* also cited promoting the policies of Section 230(b)(2). The Commission subsequently reversed this determination in *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028 (2008).

Further, if the Commission does reclassify wireline broadband Internet access services as "telecommunications," the Commission must also address the potential statutory contradiction that the Commission identified in its 2007 *Wireless Declaratory Order*. That Order explained that "Congress noted that the definition of 'telecommunications service' was intended to include commercial mobile service." In other words, if mobile broadband is a "telecommunications service," then it must also be CMRS or a statutory contradiction results. This is true because while Section 3 of the Act *requires* common carrier treatment of a telecommunications service, Section 332(c)(2) *prohibits* common carrier treatment unless the wireless service satisfies the definition of "commercial mobile service" in Section 332(d)(1).⁵⁹

In its forthcoming Open Internet order, the Commission can avoid this statutory contradiction—and maintain consistent regulatory treatment—by reclassifying mobile broadband Internet access as a "telecommunications service" and also find it to be an "interconnected service" under Section 332(d)(1) and/or the "functional equivalent of a commercial mobile service" under Section 332(d)(3). As the *Wireless Declaratory Order* concluded, the telecommunications service and CMRS classifications can and must go hand in hand to avoid a "contradiction in the statutory framework arising from classifying mobile wireless broadband Internet access service" as a telecommunications service but not as a commercial mobile service. ⁶⁰

Finally, the *Wireless Declaratory Ruling* placed great emphasis on a policy of technological neutrality, applying one consistent framework for all broadband services.⁶¹ Assuming the Commission classifies wireline broadband Internet access service as a Title II service, this policy consideration now drives the Commission in the opposite direction of its 2007 decision.

4. The Finding that Mobile Broadband is Interconnected Has No Impact on Any Other Service or Proceeding.

Given the number of open proceedings and questions with regard to the classification of services such as Interconnected VoIP and the broad claims made by parties seeking to merge with regard to economic substitutability, it is necessary to emphasize the extreme narrowness of a Commission determination here that mobile broadband provides the capability to communicate

⁵⁸ Wireless Declaratory Ruling ¶ 40 (citing H.R. Conference Report 104-458).

⁵⁹ *Id.* ¶ 50. The Order concluded that even if mobile broadband services were an "interconnected service" for purposes of Section 332, "we find it would be unreasonable to classify mobile wireless broadband Internet access service as commercial mobile service because that would result in an internal contradiction within the statutory scheme." *Id.* ¶ 41.

⁶⁰ *Id.* ¶ 49.

⁶¹ Wireless Declaratory Ruling ¶ 55.

with other users on the PSN and that mobile broadband is therefore a CMRS to be regulated under Title II. As the Commission recently affirmed in its *Tech Transition Declaratory Ruling*, Title II services will not be considered "functionally equivalent" simply because they share in common the capacity to send and receive voice calls from any other PSN user. ⁶² Instead, whether services are sufficiently similar to warrant similar regulatory treatment depends on a host of factors. A perusal of the list of services classified as "CMRS" clearly demonstrates that the simple fact that mobile broadband provides the capability for subscribers to reach the PSN tells us nothing about the appropriate regulatory treatment—other than the fact that the service must be regulated as a Title II common carrier.

Similarly, in the merger context, the question of whether a product acts as a substitute for another product is determined by whether consumers can and/or would switch to the alternative service in the face of a small but significant non-transitory increase in price ("SSNIP"). As Public Knowledge has documented in several recent filings, mobile broadband does not constitute a substitute for either wireline broadband or wireline voice. 63

Finally, the Commission need not address here whether stand alone interconnected VoIP services that use broadband connections are themselves Title II services. The question presented here is the interpretation of the word "capability" in the Commission's definition of "interconnected" in Part 20.3, and whether mobile broadband provides this "capability." The question of the appropriate classification of VoIP services can continue to wait another day. ⁶⁴

- C. Alternatively, the Commission May Find Mobile Broadband is the Functional Equivalent of CMRS and Treat It as Such.
 - If the Commission Classifies Broadband Internet Access as a Title II
 Service, It Should Find Mobile Broadband is a "Functional Equivalent" of CMRS.

Wireless providers have repeatedly argued that even if broadband is a Title II service, the Commission may not regulate it as a common carrier because it does not meet the definition of "commercial mobile radio service" ("CMRS"), and therefore must be classified as a "private

 $^{^{62}}$ Tech Transitions NPRM $\P\P$ 114-19.

⁶³ See Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Nov. 13, 2014); Letter from Jodie Griffin, Senior Staff Attorney, Public Knowledge, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 13-05, 12-353 (Nov. 6, 2014).

⁶⁴ *Cf. Wireless Declaratory Ruling*, 22 FCC Rcd at 5918 (noting that "our conclusion that mobile wireless broadband is not an 'interconnected service' under Section 332 does not decide whether other services or applications may be 'interconnected service' under Section 332 and it implementing regulations" and expressly reserving the question of the regulatory status of interconnected VoIP).



mobile radio service" ("PMRS"). As PMRS, mobile broadband would be insulated from common carrier regulation (even if it is otherwise a Title II service) by the "common carrier prohibition." ⁶⁵

Congress, however, did not trap the Commission in such an absurd result. Congress recognized that, as technology evolved, services that did not initially appear to be CMRS might eventually reach a point where they were essentially the same service. As a consequence, Congress inserted into the final version of the law an exception to the PMRS rule for services that are the "functional equivalent" of CMRS. As the legislative history demonstrates, Congress intended this safety valve to prevent a hard and fast division between CMRS and PMRS from excluding services from regulation when the public interest—and common sense—required. 66

Section 332(d)(3) defines PMRS as "any mobile service...that is not a commercial mobile radio service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."⁶⁷ This language did not arise by chance. As the legislative history makes plain, Congress drafted the amendments to Section 332 in response to the Commission's increasingly inconsistent regulatory treatment of emerging mobile services under the traditional *NARUC* test. ⁶⁸ Congress perceived that a PMRS wireless service—originally easily distinguishable from CMRS—could become indistinguishable from Title II wireless services. And so it has. In 2007, when the Commission made its initial determination, there was no cause to consider whether wireless broadband service was "functionally equivalent" to CMRS. As discussed above, the distinction made by the Commission between calls made with native dialing capacity and calls made via VoIP applications has increasingly faded. There is no doubt that phones using mobile broadband are capable of replicating the functions of CMRS phones yet mobile broadband services evades necessary treatment as common carriers in precisely the way Congress found abhorrent in 1993. The Commission can easily eliminate this disparity by updating its legal determinations to keep abreast of the technological evolution since its 2007 analysis.

There can be little doubt that today mobile broadband Internet access service is "the functional equivalent" of what a "commercial mobile service" was in 1993. Like mobile voice, mobile broadband service is functionally an "interconnected service" that simply uses a different, more global numbering system (IP addressing) "that gives its customers the capability to communicate to or receive communications from all other users" of the Internet, as well as the

⁶⁵ Cellco Partnership v. FCC, 700 F.3d 534 (D.C. Cir. 2013).

⁶⁶ See Letter from Gene Kimmelman, President, Public Knowledge, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3-4 (Nov. 7, 2014).

⁶⁷ 47 U.S.C. § 332(d)(3) (emphasis added).

⁶⁸ See Letter from Gene Kimmelman, President, Public Knowledge, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 4 (Nov. 7, 2014).

⁶⁹ Wireless Declaratory Ruling, 22 FCC Rcd. 5917 ¶ 45.

capability to connect to all other users of the public switched *telephone* network through the use of VoIP applications that interconnect with the telephone system and NANP. Subscribers can connect with all other users using the public IP addressing system—and broadband users can also call any NANP telephone number they wish using their mobile broadband connections.

2. The Commission Provided More than Adequate Notice It Would Reconsider Both Whether Mobile Should Be CMRS or a "Functional Equivalent" to CMRS.

The Commission provided adequate notice in the 2014 *Open Internet NPRM*⁷⁰ that it could reclassify mobile broadband as a Title II CMRS service, or the functional equivalent of CMRS. The Commission explicitly recounted the history of classification across services, including wireless services.⁷¹ The Commission reviewed the history of its *2010 Framework NOI*, observed that the Commission "asked whether it should similarly alter its approach to wireless broadband, noting that Section 332 requires that wireless services that meet the definition of 'commercial mobile service' be regulated as common carriers," and sought "further comment on whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service (or components thereof)."⁷² The Commission then explicitly asked whether this reclassification would serve the open Internet and what rules the Commission should adopt pursuant to such reclassification.⁷³

As if all this were not enough, the Commission in the next paragraph asked: "For mobile broadband Internet access service, does that service fit the definition of 'commercial mobile radio service'" and cited to both Section 332 generally and the Commission's definition of "commercial mobile radio service" in Rule 20.3 specifically. Rule 20.3 defines "commercial mobile radio service" as:

Commercial mobile radio service. A mobile service that is:

(a)

- (1) provided for profit, i.e., with the intent of receiving compensation or monetary gain;
- (2) An interconnected service; and

Protecting and Promoting the Open Internet, Docket No. 14-28, *Notice of Proposed Rulemaking* (rel. May 15, 2014) ("Open Internet NPRM").

⁷¹ *Id.* at ¶ 149 & n.298.

⁷² Id. at ¶ 149 (citing Framework for Broadband Internet Service, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd. 7866 (2010) ("Framework NOI")).

 $^{^{73}}$ Id

 $^{^{74}}$ Id. at ¶ 150 & n.307 (citing 47 U.S.C. § 332; 47 C.F.R. § 20.3).



- (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or
- (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.⁷⁵

In short, the Commission plainly gave notice that it would revisit its classification decision for mobile broadband and would reconsider whether to reclassify mobile broadband as either a commercial mobile radio service, or the functional equivalent of a commercial mobile radio service. Indeed, as explained further below, because of the potential statutory contradiction that would occur if mobile broadband was reclassified as a "telecommunications service" *without* revisiting its status as CMRS under Section 332, it is not plausible to argue that the *Open Internet NPRM* intended to ignore the issue.

Nor can carriers (either wireless or wireline) claim any undue reliance issue. Carriers have been on notice of this issue since the Commission released the *Framework NOI* in May 2010. After more than four years of advance warning that this day might come, carriers cannot now claim that they are taken unawares or did not have the opportunity to adequately consider the possibility when making their investments.

3. The Commission Need Not Apply the Factors in Rule 20.9(14) to Determine Functional Equivalence.

The fact that the Commission's rules contemplate a process for application by petition does not preclude the Commission from issuing a declaratory ruling on its own motion. Rule 20.9(14)(i) states that a service that is not CMRS will be presumed to be PMRS.⁷⁶ Rule 20.9(14)(ii) provides that "any interested party may seek to overcome the presumption that a *particular* mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider's regulatory treatment as a private mobile radio service." The subsections of Rule 20.9(14)(ii)(A)-(C) provide guidance as to what a petitioner must show, and how the Commission will evaluate the evidence provided by the petitioner.

It is clear, both from the plain language of the Rule and from the context of the 1994 Order adopting the Rule that Rule 20.9(14)(ii) exclusively addresses the right of interested parties to file petitions with regard to specific service offerings from specific carriers, and was

⁷⁵ 47 C.F.R. § 20.3 (emphasis added).

⁷⁶ 47 C.F.R. § 20.9(14)(i).

⁷⁷ 47 C.F.R. § 20.9(14)(ii) (emphasis added).

not intended to apply to the Commission in its general rulemaking capacity. First, the plain language of the Rule describes a petition "by any interested party." There is no mention of any action by the Commission. All of the factors listed that the Commission will weigh are subsections of the section addressing a petition by an interested party. There is simply no basis to construe Section 20.9(14)(ii) as having any application in the course of a Commission's own determination of a general service classification – particularly where the Commission has never before considered the question of functional equivalency to CMRS.

To the contrary, every indication from the 1994 *CMRS Order* points to a Commission intent to construe the definition of CMRS and functional equivalence broadly, evaluating the standard statutory language. The Commission explicitly noted that "the statute grants the Commission authority to specify the functional equivalent of CMRS." The Commission adopted a set of presumptions, and allowed interested parties to apply individual Petitions with regard to specific service offerings by individual carriers, a process it immediately contrasted with its own rulemaking by authority by adopting entirely opposite presumptions for the PCS service applying none of the criteria incorporated in Rule 20.9(14)(ii)(A)-(C).

In short, there is no indication that Rule 20.9(14)(ii)(A)-(C) applies to anything other than a specific petition filed by an interested party. Surely had the Commission intended to bind itself and abrogate its general rulemaking authority it would have provided some indication of this fact. Most certainly it would not have imposed upon itself such a dramatic and unprecedented limitation with rules whose plain language make the factors listed a subsection of a provision applying only to individual petitions.

⁷⁸ See Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 2nd Report and Order, 9 FCC Rcd 1411, 1443-48 (1994) ("1994 CMRS Order").

⁷⁹ See id. at ¶ 76 ("Congress intended to narrow the scope of the definition for private mobile radio service by adding language stating that a mobile service would be considered private if it is not the functional equivalent of a commercial mobile radio service"); see also id. at ¶ 78 (recounting history and concluding that "if the service amounts to the 'functional equivalent' of a service that is classified as CMRS, it should be regulated as CMRS").

 $^{^{80}}$ *Id.* at ¶ 79.

⁸¹ *Id. See also* ¶ 80 (the language "based on such a showing" referring back to the last sentence of the previous paragraph referring to "a *petitioner* challenging the PMRS classification" (emphasis added).

⁸² *Id.* at n. 172.



III. The Commission Need Not Determine the Final Status of Every Section of Title II in this Order.

A. The Commission Must Explicitly Apply Some Sections of Title II.

Strong, effective, and defensible Open Internet rules will necessarily be grounded in provisions like Sections 201, 202, and 208. 83 The Commission should therefore explicitly apply at least some provisions of Title II to broadband access service, even if it implements interim provisions to address other provisions of Title II outside of this proceeding. 84

However, issuing a stay on certain rules or adopting interim provisions is not the same as adopting a presumption of forbearance. As Public Knowledge has discussed before, forbearance is a powerful tool and the Commission should therefore exercise its forbearance powers judiciously. The Commission should not simply assume it will forbear from any provision of Title II, but should instead use interim rules to give itself time to determine where forbearing would actually serve the public interest.

In addition to not initially forbearing from certain provisions governing service changes, interconnection, deployment, consumer protection, and the Commission's ability to ensure accountability and prescribe remedies, ⁸⁶ the Commission should explicitly apply certain sections of Title II in reclassifying broadband access service and crafting Open Internet rules in this docket. For example, applying sections 201, 202, and 208 to broadband access service will be a critical part of the foundation of effective and legally stable net neutrality rules. Meanwhile, for issues like universal service, ⁸⁷ privacy, ⁸⁸ and interconnection ⁸⁹ the Commission could decline to

⁸³ See 47 U.S.C. §§ 201, 202, 208.

In 2010 the Commission sought comment on a similar idea, noting that after classifying and forbearing from some provisions, it could determine how sections 222, 254 and 255 could apply in the context of broadband connectivity. *See Framework NOI* at ¶¶ 67-99. In light of the growing importance of interconnection issues, even if the Commission generally adopts the framework proposed in 2010, it should not forbear from Section 251(a).

⁸⁵ See Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, Protecting and Promoting the Open Internet, GN Docket No. 14-28, pp. 78-83 (July 15, 2014).

⁸⁶ See 47 U.S.C. §§ 203, 205-207, 209, 211-216, 218-220, 222, 225, 251, 254-257.

⁸⁷ 47 U.S.C. § 254.

^{88 47} U.S.C. § 222.

⁸⁹ 47 U.S.C. § 251(a). The issue of IP interconnection and competition policies could also be addressed in dockets related to the technology transitions and special access. *See* Ensuring Customer Premises Equipment Backup Power for Continuity of Communications, PS Docket No. 14-174, Technology Transitions, GN Docket No. 13-5, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, RM-11358, Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Corporation Petition for Rulemaking to Reform Regulation of

permanently forbear from existing rules but address the applicability of these rules in other proceedings.

B. Alternatively, the Commission Should Adopt the Same Forbearance as Applied to CMRS in 1994.

Although Public Knowledge maintains the current broadband market is substantially different from the market faced by CMRS providers in 1994, ⁹⁰ if the Commission so chooses it has the option of following the forbearance model used for CMRS services in 1994. ⁹¹ No one can deny the wireless industry has thrived under the existing set of rules, which do not forbear nearly as broadly as the Commission proposed to forbear in 2010. It would therefore make sense for the Commission to adopt a similar framework for broadband.

In 1993, the Commission initiated its own rulemaking, in which the Commission proposed forbearing from enforcing certain Title II provisions against CMRS providers. ⁹² The Commission ultimately decided to forbear from enforcing Sections 203 (tariff filing requirements), 204 (tariff suspensions), 205 (just and reasonable rates requirement), 211 (filing contracts with other carriers), 212 (prohibitions on interlocking directorates), and 214 (service initiation or discontinuance requirements), except for Section 214's international authorization requirement, against CMRS providers. ⁹³

While the Commission has modified this forbearance over the years, it has generally found this structure flexible enough for carriers while retaining vital consumer protections. In 1998, the Commission declined to also forbear from Sections 201 and 202, the international authorization requirement of section 214, and the resale rule of 47 C.F.R. § 20.12(b). 94 As the Commission explained, these sections are the "heart" of the Commission's consumer protection

Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, *Notice of Proposed Rulemaking and Declaratory Ruling* (rel. Nov. 25, 2014).

⁹⁰ See Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, Protecting and Promoting the Open Internet, GN Docket No. 14-28, pp. 93-94 (July 15, 2014).

⁹¹ Implementation of Sections 3(n) & 332 of the Communications Act, *Second Report & Order*, 9 FCC Rcd. 1411, 1467-68, ¶ 138 (1994).

⁹² Implementation of Sections 3(n) & 332 of the Commc'ns Act, *Notice of Proposed Rulemaking*, 8 F.C.C.R. 7988, 7998-8001, ¶¶ 49-68 (1993).

⁹³ Implementation of Sections 3(n) & 332 of the Commc'ns Act, *Second Report & Order*, 9 F.C.C.R. 1411, 1478-1480, 1485, ¶¶ 174-182, 197 (1994), *see also* 47 C.F.R. § 20.15.

⁹⁴ Personal Commc'ns Ind. Ass'n's Broadband Pers. Commc'ns Servs. Alliance's Pet. for Forbearance For Broadband Pers. Commc'ns Servs., *Mem. Op. & Order & Notice of Proposed Rulemaking*, 13 FCC Rcd. 16,857, 16,860, ¶ 4 (1998).

regime, and apply with equal force in competitive markets as well as to regulated monopoly providers. ⁹⁵

As discussed above, forbearance decisions on such a wide range of provisions are best made in their own relevant proceedings. However, if the Commission decides to rule on a wide swath of forbearance determinations in this docket, the Commission should follow its own example in CMRS service and only forbear from the same limited number of provisions.

C. The Commission Can Stay Some Sections of Title II on an Interim Basis.

The Commission can, within its discretion, stay some provisions of Title II on an interim basis to address the provisions necessary to achieve an open Internet in this docket, and later handle the provisions of Title II that have implications well beyond net neutrality.

Title II implements policies for telecommunications services that reach beyond the basic nondiscrimination principle—or rather, are different forms of ensuring nondiscriminatory access. For example, some provisions of Title II are aimed directly at achieving universal and affordable access for customers, ⁹⁶ preventing fraudulent charges on consumers' bills, ⁹⁷ and protecting users' privacy. ⁹⁸ These goals and protections are all critically important for consumers but may require further examination by the Commission. The Commission need not decide all of these issues in the context of this Open Internet proceeding, and so the Commission can temporarily stay these rules, implement interim provisions, and handle other aspects of Title II in due course.

While the Commission takes time to consider these additional provisions of Title II, it can implement interim rules to preserve an open Internet while taking more time to determine how other provisions of Title II best apply to Internet access service. ⁹⁹ The Commission could

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⁹⁵ *Id.* at 16866.

⁹⁶ See 47 U.S.C. § 151 (creating the Commission for the purpose of "mak[ing] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges..."); 47 U.S.C. § 254 (requiring the Commission and the Federal-State Joint Board on universal service to base universal service policies on the principal that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.").

⁹⁷ See 47 U.S.C. § 201(b) (requiring that common carriers' practices be just and reasonable); 47 U.S.C. § 258 (prohibiting unauthorized changes in customers' carrier selections); 47 C.F.R. §§ 64.2400-64.2401 (truth-in-billing requirements).

⁹⁸ See 47 U.S.C. § 222 (protecting privacy of call records).

⁹⁹ See Reply Comments of Public Knowledge and Benton Foundation, Protecting and Promoting the Open Internet, GN Docket No. 14-28, pp. 23-24 (Sept. 15, 2014); Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, Protecting and Promoting the Open Internet, GN Docket No. 14-28, pp. 95-97 (July 15, 2014); Reply Comments of Public Knowledge, Framework for Broadband Internet Service, GN Docket No. 10-127, pp. 23-25 (Aug 12, 2010).

also fashion this relief by reclassifying Internet access service under Title II, applying all potentially applicable rules, and staying the operation of some of those rules pending further comment and deliberation.

It is not unprecedented for the Commission to stay the operation of its rules if so doing would prevent irreparable harm and serve the public interest. For example, in 2003 the Commission, on its own motion, stayed the effective date of a particular clarification of its unsolicited facsimile rules. The Commission stayed its horizontal cable ownership limits pending resolution of challenge to the rules in court. In 1994, the Commission granted a stay of its 931 MHz paging rules on its own motion. And in 1999, the Commission stayed certain of its rules regarding coordination of formerly shared frequencies.

A stay would be entirely appropriate here, rather than forcing the Commission to chose between immediate forbearance and immediate application of potentially disruptive application of statutory provisions. As the Commission noted in its 2010 *Notice of Inquiry*, it has previously imposed temporary forbearances as well as staying operation of its rules where the situation warrants. ¹⁰⁴ As it contemplated in 2010, the Commission should exercise this discretion.

IV. A Specialized Services Exemption Must Not Undermine the Goals of Strong Open Internet Rules.

Public Knowledge has long been wary of exempting specialized services from bright line open Internet rules. 105 While there might be some limited situations in which exempting such

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (rel. Aug. 18, 2003).

¹⁰¹ Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, MM Docket No. 92-264, FCC 99-289, *Second Report and Order* (rel. Sept. 23, 1999) (staying effective date of the horizontal ownership limits pending final resolution of the District Court's decision in *Daniels Cablevision v. United States*); Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, MM Docket No. 92-264, FCC 99-289, *Third Report and Order* (rel. Oct. 20, 1999) (continuing staying of horizontal ownership limits).

Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115 (rel. Jan. 10, 1995) (granting a stay of the effective date of the 931 MHz paging rules on the Commission's own motion).

¹⁰³ See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Fourth Memorandum Opinion and Order* (rel. Aug. 5, 1999).

¹⁰⁴ Framework NOI, 25 FCC Rcd at 7901 n.218.

¹⁰⁵ See, e.g. Comments of Open Internet Coalition, GN Docket No. 09-191 WC Docket No. 07-52, at 9 (Oct. 12, 2010); Reply Comments of Benton Foundation, et al., GN Docket No. 09-191, WC Docket No. 07-51, at 3-4 (Nov. 4, 2010).

services from open Internet rules is appropriate, such exemptions provide ISPs with an opportunity to force service providers to pay special tolls, can be used to advantage ISP-affiliated services over unaffiliated competitors, and can create a disincentive for ISPs to invest in the open Internet part of the network. All of this undermines the virtuous cycle and works counter to the public interest.

Public Knowledge does not believe that a specialized services exemption is necessary for the proper functioning of robust open Internet rules. Nonetheless, if the Commission sees fit to include such an exemption, it should be strictly limited. The prospects for abuse, and for specialized services to become an exemption that swallows the entire open Internet, is too great to hope that an undefined specialized services exemption will serve the public interest.

Any new Open Internet Report and Order must include language reaffirming the Commission's recognition that specialized services have a high potential to be abused by ISPs. ¹⁰⁷ Furthermore, the Commission should consider describing clear criteria that would exclude a service from qualifying as a specialized service.

In particular, the Commission should consider a suggestion from its Open Internet Advisory Committee to "compare what innovators can do using a specialized service as compared with the public Internet." The open Internet can serve as a benchmark against which to evaluate proposed specialized services. If a proposed specialized service is the functional equivalent of one offered on the open Internet, that proposed service should not be granted special status.

In comparing the proposed specialized service to those that exist on the open Internet, the burden should be on the requesting party (be they an ISP or potential edge service provider) to show why the specialized service could not operate on the open Internet. Even if the Commission decides to exempt a service from the Open Internet Rules, the requesting parties must remain on notice that the exemption is not permanent. The capability of the open Internet is constantly evolving and the fact that it cannot support a given service at one time does not preclude it from supporting it in the future. As such, any beneficiaries of an exemption should be on notice that it could be challenged at any time. Similarly, reliance on the exemption for investment purposes should never be used to justify its continued existence after its technical necessity has passed.

Such a bright line rule would help deter ISPs from using specialized services to "bypass[] Open Internet protections, supplant[] the Open Internet, and enable[] anticompetitive conduct." ¹⁰⁹ ISPs could not simply declare that an offering "requires" a specialized service in

¹⁰⁶ See, e.g. Open Internet Advisory Committee, 2013 Annual Report, at 66-71 (Aug. 20, 2013) ("OIAC Report"); Preserving the Open Internet Broadband Industry Practices, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52, at 112-114 (Dec. 23, 2010) ("Broadband R&O").

¹⁰⁷ *See Broadband R&O* at 112-114.

¹⁰⁸ OAIC Report at 70.

 $^{^{109}}$ *R&O* at 112.

order to function. The existence of a functionally equivalent offering on the open Internet should be explicit proof that such a claim is illegitimate, and that the specialized service is unnecessary.

It would be appropriate for the Commission to consider existing regulatory categories when deciding if two offerings are functionally equivalent. It may be that specialized services are necessary for the full functionality of services with existing regulatory structures.

For example, in many ways interconnected voice is a competitor to a variety non-facilities-based VoIP offerings. However, unlike non-facilities-based VoIP offerings, interconnected voice comes with an existing regulatory structure. That structure comes with additional obligations with regard to services such as 911 calling, ¹¹⁰ quality of service guarantees, ¹¹¹ nondiscrimination in calling, ¹¹² and more. A specialized service may be required for a provider to meet those obligations, and therefore would be justified as long as the obligations exist. In that case, the specialized service path could be thought of as a benefit obtained in return for meeting the regulatory obligations.

Regardless of how the Commission envisions a specialized service exemption, it must be vigilant in preventing ISPs from using specialized services to undermine completion with their own or affiliated offerings. While video is the most obvious candidate for this type of manipulation, it is not alone. As new services evolve, the Commission must prevent ISPs from using specialized services as an excuse to delay upgrades and extract rents from new innovations.

Conclusion

This filing merely attempts to address some of the legal problems PK has read in the docket and heard discussed in the communications bar. While opponents of the open Internet will undoubtedly raise various legal obstacles in the Commission's path, neither the issues PK addresses in this filing nor any other issue should slow the Commission's work, nor delay it from protecting consumers and innovation by classifying broadband access as a Title II telecommunications service and enacting strong open Internet rules using that authority.

Respectfully submitted,

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¹¹⁰ See 47 U.S.C. §§ 227(b)(1)(A), 271(c)(2)(B)(vii); 47 C.F.R. 20.18.

¹¹¹ See 47 U.S.C. §§ 214(a), 226, 251, 252(c), 254(b).

¹¹² See 47 U.S.C. §§ 202, 251(c)(2)(D), 251(c)(3).



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